

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed

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# **COMPARING THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND OUTER SPACE TREATY IN RESPECT TO EQUITABLE ACCESS AND THE PRINCIPLE OF COMMON HERITAGE OF MANKIND**

AUTHORED BY - ARYAN SOOD

## **ABSTRACT**

The law applicable to the sea (United Nations Convention on the Law of the Sea) and the law applicable to space (Outer Space Treaty, 1967 and the Moon Agreement) share certain similar principles, through which they can amend their workings. Both the treaties operate under the principle of common human heritage and peaceful usage. However, specifically the Moon Agreement cannot be directly compared to the United Nations Convention on the Law of the Sea due to the inherent difficulty in access to the domains. However, certain characteristics like the composition of the International Seabed Authority and the principle of 'Ocean Equity' can be transferred to the Moon Agreement at a time when exploitation of lunar resources become commonly accessible for nations. parallels and contrasts between transit rights in maritime and outer space zones. There are also aspects of distinctions in the sovereignty between territorial waters and high seas shape these rights. Outer space law, akin to high seas law, affords transit rights, reflecting a shared emphasis on equitable access. However, differences arise between space law and the law of the sea due to the existence of sovereign territorial waters where states can exercise a higher degree of control, which isn't the scenario in outer space. Lastly, the principle of the Common Heritage of Humanity embodies the idea that certain areas and resources, whether on Earth or beyond, are the common property of humanity and should be utilized for the collective benefit of present and future generations. These principles also manifest within UNCLOS and the Moon Agreement. These international agreements establish frameworks for the management and exploitation of resources in areas beyond national jurisdiction, emphasizing equitable access, environmental preservation, and the promotion of peaceful cooperation both on Earth and in outer space.

**Keywords:** Peaceful purposes, Resource exploitation, Sovereignty, Treaty.

## INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) and the treaties governing outer space, such as the Outer Space Treaty and the Moon Agreement, share fundamental principles centered on peaceful usage and the common heritage of mankind. While both address equitable access to resources beyond national jurisdiction, the Moon Agreement faces unique challenges due to limited accessibility. Nonetheless, parallels can be drawn, particularly regarding transit rights, although distinctions in sovereignty shape these rights differently in maritime and outer space zones. The principle of the Common Heritage of Humanity underscores the collective responsibility for managing and preserving resources both on Earth and beyond, as enshrined in these international agreements.

### 1. CONSTITUTION OF A BODY SIMILAR TO ISA FOR THE MOON AGREEMENT AND THE INCORPORATION OF THE PRINCIPLE OF OCEAN EQUITY IN THE CONTEXT OF MOON RESOURCE EXPLOITATION:

The United Nations Convention on the Law of the Sea ('UNCLOS') and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea ('1994 Agreement') provides for the formation of the International Seabed Authority ('ISA'). In accordance with UNCLOS, Article 156 (2)<sup>1</sup>, all States Parties to UNCLOS are *ipso facto* members of ISA. As of 18 May 2023, ISA has 169 Members, including 168 Member States and the European Union.

The ISA consists of three main components: the Assembly, the Executive Authority, and the Secretary-General. The Assembly, comprising all ISA members, is responsible for establishing general policies and budgets. The Executive Authority, a 36-person council chosen by the ISA, handles the approval of contracts related to seabed exploration and mining. The Secretary-General, selected by the Assembly for a four-year term upon recommendation from the council, oversees the implementation of ISA's mandates and operations. Together, these entities govern the utilization of international seabed resources, balancing commercial interests with environmental concerns and equitable distribution of benefits.

In the Moon Agreement however, no such body has been contemplated. In terms of landing

<sup>1</sup> United Nations Convention on the Law of the Sea, art. 156 (2), Dec. 10, 1982, 1833 U.N.T.S. 397.

probes, sending satellites, landing people on the moon or any other activity that involves the usage of the moon, the States are given a freedom to do as they please as long as they are not affecting the ability of another nation to access the moon. These ideals combined with the idea of a country's inability to claim sovereignty over any part of the moon become inadequate when the countries could soon possess the technology to exploit resources from the moon. Such exploitation, without a proper framework to govern the same, may cause friction between nations.

A body needs to be established to ensure that the any mission to the moon which may require exploiting resources has been implemented in the same way/composition as the ISA. Certain considerations, especially the fact that space is not accessible to most countries, and only a few, could cause disparity in the exploitation of the resources of the moon. The Moon Agreement does not take this into consideration and would certainly be subject to amendments if it was to keep up equity when space technology develops manifoldly.

Ocean equity is the fairness of how people are treated in ocean industries and how policies are developed and implemented.<sup>2</sup> Access to ocean resources is often distributed inequitably, with many benefits going to a few while the most vulnerable bear the most harm from development. For example, only a few countries can afford deep-sea science, which means many countries don't have access to that data. Obviously, all of this is subject to the fact that by the time exploiting resources from the moon would become common for nations, by when the access to the moon would become considerably easier, similar to how countries are slowly growing in terms of access to the resources of the ocean. A concept of '**Space Equity**' would ensure equitable exploitation of the resources of the moon and ensure that no country continuously exploits the lunar resources which may cause other nations to lose their opportunity to do the same. This can only be ensured by an appropriate composition of the newly created administrative body.

## **2. TRANSIT RIGHTS IN MARITIME ZONES AND OUTER SPACE:**

The concept of innocent passage is a fundamental principle in the law of the sea, governing the rights and obligations of vessels navigating through the territorial waters of coastal states. It delineates the permissible activities of foreign ships passing through these waters, ensuring

<sup>2</sup> Osterblom, H., Wabnitz, C. C., & Tladi, D. Towards ocean equity. (2020).



both the rights of coastal states to regulate maritime traffic for security and environmental protection and the rights of other states to navigate freely on the high seas.

Territorial waters are defined as the area extending up to 12 nautical miles from a coastal state's baseline<sup>3</sup>. Within this zone, coastal states exercise sovereignty<sup>4</sup>, subject to the rights of innocent passage and other lawful uses recognized under international law. The principle of innocent passage, enshrined in the United Nations Convention on the Law of the Sea (UNCLOS), grants foreign vessels the right to traverse these waters peacefully, without engaging in any activities prejudicial to the peace, good order, or security of the coastal state.

The scope of innocent passage encompasses various activities, including navigation, overflight, fishing, and scientific research, provided they are conducted in a manner consistent with the principles of non-interference and due regard for the rights of the coastal state<sup>5</sup>. However, certain activities are expressly prohibited during innocent passage, such as military exercises, intelligence gathering, and weapons testing.

High seas, on the other hand, refer to the marine areas beyond the territorial waters of any state. These areas are considered *res communis*<sup>6</sup>, belonging to all nations and subject to the freedoms of navigation and overflight, as well as other lawful uses such as fishing and scientific research. Unlike in territorial waters, where coastal states enjoy sovereignty, no single state has jurisdiction over the high seas. Instead, they are governed by customary international law and UNCLOS provisions, which establish a legal framework for the peaceful use and conservation of marine resources.

The distinction between territorial waters and the high seas is crucial in determining the rights and obligations of states and vessels operating in maritime areas. While coastal states have primary jurisdiction over their territorial waters, they must respect the rights of innocent passage accorded to foreign ships. Conversely, on the high seas, all states enjoy equal rights and freedoms, subject only to the limitations and obligations prescribed by international law,

<sup>3</sup> United Nations Convention on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>4</sup> United Nations Convention on the Law of the Sea, art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>5</sup> Peter. B. Walker, "What is Innocent Passage?" 21 Naval War College Review 53, 54 (1969).

<sup>6</sup> Hugo Caminos & Vincent P. Cogliati-Bantz, "The Legal Regime of Straits: Contemporary Challenges & Solutions" 155 (Cambridge University Press 2014)

and this includes the right of transit passage<sup>7</sup> as enumerated in UNCLOS.

UNCLOS provides detailed rules and procedures concerning innocent passage, including notification requirements, safety regulations, and environmental protection measures. States are obligated to respect these provisions and ensure compliance by vessels navigating through their territorial waters. Additionally, UNCLOS establishes mechanisms for dispute resolution and international cooperation to address issues arising from the exercise of rights and freedoms at sea.

Space law, much like the law of the sea, governs the activities of states and entities in a realm beyond national jurisdiction. In the absence of sovereign territory in outer space<sup>8</sup>, the principles of freedom of access and transit play a crucial role in ensuring the peaceful and equitable use of this domain. While there exists no concept such as “innocent passage” in outer space law due to the lack of any sovereignty in outer space, there is a right of transit passage enjoyed by all states similar to the scenario in High Seas.

The Outer Space Treaty of 1967, a foundational document in space law, establishes the principle that outer space is free for exploration and use by all states, without discrimination or territorial appropriation. This treaty, ratified by over 100 countries, sets forth fundamental principles guiding the activities of states in space, including the principle of freedom of access. The Outer Space Treaty stipulates that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by any means, and all states have the right to freely explore and use outer space<sup>9</sup>.

Within this framework, the concept of transit passage emerges as a corollary to the principle of freedom of access<sup>10</sup>. Transit passage in outer space refers to the unimpeded passage of spacecraft through outer space, including through celestial bodies’ orbits or spheres of influence, without interference from other states. This right ensures that spacecraft can traverse space freely and safely, facilitating space exploration, satellite deployment, and other activities

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<sup>7</sup> United Nations Convention on the Law of the Sea, art. 38, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>8</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art.2, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>9</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art.1, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>10</sup> Isaak I. Dore, “International Law and the Preservation of the Ocean Space and Outer Space as Zones of Peace: Progress and Problems”, 15 Cornell Int’l L.J. 1, 6 (1982)

essential to the peaceful use of outer space.

While the Outer Space Treaty guarantees the freedom of transit passage, it also imposes certain obligations on states to ensure the safety and security of space activities. States are required to conduct their space activities in accordance with international law<sup>11</sup>, including the prevention of harmful interference with the space activities of other states and the protection of the space environment from contamination or damage.

### **3. THE COMMON HERITAGE OF HUMANITY WITH SPECIAL REFERENCE TO THE UNCLOS AND THE MOON TREATY**

The principle of the common heritage of humanity (CHM) marks a pivotal development in international law, emphasizing the collective ownership and stewardship of certain natural resources and spaces for the benefit of all humanity. This principle is foundational in understanding the legal frameworks governing the world's oceans and outer space, particularly through the United Nations Convention on the Law of the Sea (UNCLOS) and the Moon Agreement (Moon Treaty). This analysis delves into the conceptualization of CHM and its legal application in UNCLOS and the Moon Treaty.

The CHM concept emerged as a response to the growing recognition of certain global commons- areas beyond national jurisdiction, such as the high seas, the ocean floor, and outer space, that require collective management to prevent exploitation and ensure equitable benefit sharing<sup>12</sup>. The legal and ethical foundation of CHM advocates for no state or individual owning these spaces; instead, they are to be managed cooperatively for the common good. This approach is aimed at promoting sustainable development, protecting the environment for future generations, and ensuring that developing countries can access the resources found in these commons.

The UNCLOS, concluded in 1982, embodies the CHM principle through its comprehensive legal framework governing the world's oceans. The genesis of UNCLOS can be traced back to the initiatives of Maltese ambassador Arvid Pardo, who, in 1967, called for the seabed and

<sup>11</sup> Morton S. Jaffe, "International Law and Space Exploration", St. Louis U. L.J. 68, 71 (1960).

<sup>12</sup> Taylor, Prue. "The Common Heritage of Mankind: A Bold Doctrine Kept Within Strict Boundaries." *Wealth of the Commons*, January 1, 2023. Accessed April 2, 2024. <https://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundaries>.

ocean floor beyond national jurisdiction to be recognized as CHM<sup>13</sup>. This led to the establishment of UNCLOS, which formalized the legal status of the ocean's resources as a shared heritage.

Part XI of UNCLOS specifically deals with the seabed, the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, declaring these and their resources as the common heritage of mankind<sup>14</sup>. It introduces a regime prohibiting appropriation by states or persons<sup>15</sup>, assigning all rights to resources to humanity as a whole, with the International Seabed Authority (ISA) designated to act on humanity's behalf<sup>16</sup>. The ISA's mandate includes ensuring equitable sharing of financial and other benefits from seabed activities, emphasizing the needs of developing states and the protection of the marine environment<sup>17</sup>.

The 1979 Moon Treaty extends the application of CHM beyond Earth, applying it to the moon and its natural resources. Article 11(1)<sup>18</sup> of the Moon Treaty explicitly designates the moon and its resources as the common heritage of mankind, setting a precedent for the non-appropriation principle in outer space. The Treaty, however, has been ratified by only a few states, partly due to disputes over the management regime for resource exploitation<sup>19</sup>. Despite limited ratification, it attempts to lay down a framework for equitable benefit sharing and peaceful exploration, hoping to defer detailed regulations to the future.

While both UNCLOS and the Moon Treaty are grounded in the CHM principle, their applications and the scope of governance differ significantly. UNCLOS has achieved broad acceptance and provides a detailed regulatory framework for the oceans, including mechanisms for dispute resolution and the protection of the marine environment. In contrast, the Moon Treaty, with limited ratification, remains largely aspirational, lacking a concrete mechanism for enforcing its provisions on resource sharing and environmental protection.

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<sup>13</sup> Anitha Krishnamurthy & Tejas Krishnamurthy, "INTERNATIONAL LAW & SPACE LAW: COMPARISON WITH LAW OF SEAS", 4 JLSR 255, 259 (2018).

<sup>14</sup> United Nations Convention on the Law of the Sea, art. 136, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>15</sup> United Nations Convention on the Law of the Sea, art. 137, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>16</sup> United Nations Convention on the Law of the Sea, art. 140, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>17</sup> United Nations Convention on the Law of the Sea, art. 143-145, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>18</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art.11, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>19</sup> Carol R. Buxton, Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property, 69 J. AIR L. & COM. 689 (2004). <https://scholar.smu.edu/jalc/vol69/iss4/3>.

Another key difference lies in the institutions established by these treaties. UNCLOS established the ISA, a concrete body with the authority to regulate mineral resource activities on the seabed. The Moon Treaty, meanwhile, lacks a similar established authority to oversee its provisions, leaving the details of its implementation vague.

A fundamental aspect of the CHM principle is the prohibition of sovereignty claims over common heritage areas and resources. Under UNCLOS, no state can claim or exercise sovereignty over the high seas or the seabed and its subsoil beyond national jurisdiction. Similarly, the Moon Treaty prohibits any country from claiming sovereignty over the moon or other celestial bodies, embodying the principle of non-appropriation.

This prohibition is crucial in preventing the monopolization of global commons by powerful states or private entities, ensuring that the benefits derived from these areas are shared equitably among all nations. It represents a shift from traditional concepts of sovereignty and property rights, proposing a model of stewardship and cooperative management for spaces and resources deemed to belong to all humanity.

The laws governing outer space and the high seas share a significant similarity in that neither domain allows for the assertion of sovereignty by any single nation. The principle upheld by the Convention on High Seas is that the high seas belong to no one country and cannot be claimed as such; they are accessible to all nations, as stated in Article 2<sup>20</sup>. This concept is further reinforced by Article 87<sup>21</sup> of the United Nations Convention on the Law of the Sea, which asserts that the high seas are open to both coastal and landlocked countries alike, ensuring equal access regardless of geographical location.

Similarly, the Outer Space Treaty, through Article 1<sup>22</sup>, declares outer space to be free for exploration and use by all states. This provision covers all celestial bodies, including the moon, planets, and asteroids, promoting the idea that space is a domain beyond national claims<sup>23</sup>. However, while this freedom is broad, it is not without its limits. All activities in outer space

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<sup>20</sup> United Nations Convention on the Law of the Sea, art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>21</sup> United Nations Convention on the Law of the Sea, art. 89, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>22</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art.1, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>23</sup> Tanja Masson Zwaan, Space law in the 21st century, in CURRENT DEVELOPMENTS IN AIR AND SPACE LAW, 208 (Singh R, et al, ed., 2012).



must adhere to established principles of international law, ensuring that the exploration and use of outer space are conducted responsibly and with consideration for the rights and interests of all nations.

## CONCLUSION

The principles of equitable resource management, non-appropriation, and shared responsibility embodied in the common heritage of humanity are fundamental to both the UNCLOS and the Moon Treaty. While UNCLOS has established concrete mechanisms through the ISA for the governance of ocean resources, the Moon Treaty's implementation remains aspirational due to limited ratification and the absence of a similar regulatory body. Nonetheless, both treaties highlight the importance of cooperative management and equitable access to resources in areas beyond national jurisdiction. As humanity continues to explore and exploit resources in both the oceans and outer space, it is imperative to uphold these principles to ensure sustainable development and the collective benefit of present and future generations.

